



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

August 24, 1998

Ms. Judith Hunter  
Paralegal  
City Attorney's Office  
City of Georgetown  
P.O. Box 409  
Georgetown, Texas 78627-0409

OR98-2010

Dear Ms. Hunter:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 117528.

The City of Georgetown (the "city") received a request for information relating to a specific Georgetown police officer. You have submitted copies of six internal affairs investigations conducted by the Georgetown Police Department (the "department") relating to the named officer. You claim that these investigations are excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you argue that most of the submitted information is excepted from disclosure under section 552.108. Section 552.108 provides in part:

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108. We note, however, that where no criminal investigation or prosecution results from a police department's internal investigation of a police officer for alleged misconduct, section 552.108 is inapplicable to the internal investigation documents. *See Morales v. Ellen*, 840 S.W.2d 519 (Tex. Civ. App.--El Paso 1992, writ denied); Open Records Decision No. 350 (1982). Here, the police department's internal investigations did not result in a criminal investigation or prosecution. Furthermore, we note that in most instances, the department has already released the details of the internal investigations to the complaining parties. Under these circumstances, we conclude that the internal investigations may not be withheld from disclosure under section 552.108.

Next, we address your contention that some of the submitted information is excepted from disclosure under common-law privacy. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 also encompasses the doctrine of common-law privacy. The doctrine of common-law privacy protects information if it is highly intimate or embarrassing such that its release would be highly objectionable to a reasonable person and the public has no legitimate interest in it. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). After reviewing the documents at issue, we conclude that the information is not protected by common-law privacy.

You also assert that some of the requested information may be withheld under the informer's privilege. The informer's privilege, incorporated into the Open Records Act by section 552.101, protects the identity of one who reports a violation or possible violation of the law to officials having the duty of enforcing that law. *See Roviato v. United States*, 353 U.S. 53, 59 (1957); Open Records Decision No. 515 at 2 (1988). The privilege also protects the content of the informer's communication to the extent that it identifies the informant. *Roviato*, 353 U.S. at 60. However, once the identity of the informer is known to those who would have cause to resent the communication, the privilege is no longer applicable. *Id.* at 60. After reviewing the documents, it appears that the officer is aware of the identities of the complaining individuals. Thus, the city may not withhold the complaining individuals identities or statements under the informer's privilege.

Finally, you claim that Exhibit D is excepted from disclosure by section 552.103 of the Government Code. Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 588 (1991). A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103 applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston*

*Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.). Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the city must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You explain that an arrested individual filed a violation of civil rights action against the city. Although this suit has been dismissed, you contend that there is a strong probability that this individual may file another related lawsuit. In this instance, the prospect of litigation is too speculative for section 552.103(a) to apply. Therefore, you may not withhold Exhibit D under the litigation exception. Furthermore, we do not agree that Exhibit D may be withheld from disclosure based on the "issue of public safety." Gov't Code § 552.006

Notwithstanding the above, some of the information within the submitted records must not be disclosed because it is confidential by law. First, we note that where an individual's criminal history record information ("CHRI") has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. See *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (concluding that federal regulations which limit access to criminal history record information that states obtain from the federal government or other states recognize privacy interest in such information). Similarly, open records decisions issued by this office acknowledge this privacy interest. See Open Records Decision Nos. 616 (1993), 565 (1990). Section 411.083 provides that any CHRI maintained by the Department of Public Safety (the "DPS") is confidential. Gov't Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; see also *id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Therefore, any CHRI that falls within the ambit of these state and federal regulations must be withheld from the requestor. Please note, however, that driving record information is not confidential under chapter 411 and must be disclosed. See Gov't Code § 411.082(2)(B).

We also note that the Seventy-fifth Legislature added section 552.130 to the Open Records Act which governs the release and use of information obtained from motor vehicle records. Section 552.130 provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state;

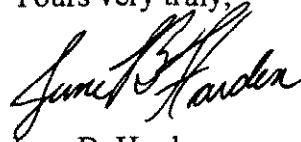
(2) a motor vehicle title or registration issued by an agency of this state; or

(3) a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document.

Gov't Code § 552.130. Therefore, the city must withhold Texas driver's license and license plate numbers pursuant to section 552.130. The remaining information must be released to the requestor.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



June B. Harden  
Assistant Attorney General  
Open Records Division

JBH/ch

Ref.: ID# 117528

Enclosures: Submitted documents

cc: Mr. Kevin Wishard  
Austin American-Statesman  
400 Whitestone Boulevard, Suite A  
Cedar Park, Texas 78729  
(w/o enclosures)